Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1977

No. 77-1153

THOMAS REESE

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
Petitioner prays that a writ of certiorari issue	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
1. The decision of the Court of Appeals conflicts with the decision of the Sixth Circuit Court of Appeals in the case of *United States v. Renner*, 496 F.2d 922 (6th Cir. 1974), and this Court should resolve that conflict	4
2. Title 18 U.S.C. § 922(h)(1) violates the Commerce Clause to the extent that it purports to regulate the acquisition of shotguns	9
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

Chambers v. Mississippi, 410 U.S. 284 (1973)	8, 9
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	9

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960)	4
Lambert v. California, 355 U.S. 225 (1957)	5, 6
Mandina v. United States, 472 F.2d 1110 (8th Cir. 1973)	10
Morrissette v. United States, 342 U.S. 246 (1952)	5, 6
Mullaney v. Wilbur, ... U.S. ..., 95 S. Ct. 1881 (1975)	8
Perez v. United States, 402 U.S. 146 (1971)	9
Robinson v. California, 370 U.S. 660 (1962)	8
United States v. Dotterweich, 320 U.S. 277 (1943)	5, 7
United States v. Freed, 401 U.S. 601 (1971)	4, 5, 6, 8
United States v. Hornback, 489 F.2d 1325 (7th Cir. 1973)	10
United States v. Park, ... U.S. ..., 95 S. Ct. 1903 (1975)	7, 8
United States v. Renner, 496 F.2d 922 (6th Cir. 1974)	4, 6
United States v. Synnes, 438 F.2d 764 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972)	9

TABLE OF AUTHORITIES CITED

Constitutional References	Page
Due Process Clause	8
Commerce Clause	9, 11

Statutes

18 U.S.C.	
§ 921(a)(4)(B)	11
§ 922	3, 9, 10
§ 922(a)(6)	3
§ 922(h)(1)	2, 3, 6, 9
Congressional Declaration of Purpose relating to § 922	10, 11
28 U.S.C.	
§ 1254(1)	2

Text

G. WILLIAMS, CRIMINAL LAW §§ 70 - 76 (1953)	5
Hart, The Aims of Criminal Law, 23 LAW & CONTEMP. PROB. 401, 422 - 25 (1953)	5
Packer, Mens Rea and The Supreme Court, 1962 S. Ct. Rev. 107, 150	7, 8
Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55, 56 (1933)	5
Tushnet, Constitutional Limitations of Substantive Criminal Law, 55 B.U. L. REV. 775, 795 (1975)	7, 8

TABLE OF AUTHORITIES CITED

Text (cont'd)	Page
Working Papers of the National Commission on Reform of the Federal Criminal Laws 135 (1970)	7, 8
Rules	
F.R.E. 608, 609 (1976)	7

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. .....

THOMAS REESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Thomas Reese, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 17, 1977.

OPINION BELOW

The unpublished opinion of the Court of Appeals

appears in the attached appendix. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 17, 1977. A timely petition for rehearing *en banc* was denied on January 13, 1978, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is a defendant charged with receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(h)(1), entitled to an instruction to the jury that they must find that he had knowledge that he was under indictment when he received the firearm in order to find him guilty?

2. Does 18 U.S.C. § 922(h)(1) violate the commerce clause because its scope exceeds the findings of Congress regarding the impact of firearms on interstate commerce?

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code:

Section 922(h)(1):

"It shall be unlawful for any person–

(1) who is under indictment for, or who

has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

STATEMENT OF THE CASE

On May 3, 1976, an indictment was returned in the United States District Court for the Central District of California charging Thomas Reese with two violations of 18 U.S.C. § 922. Count one charged him with making a false statement in connection with the purchase of a firearm, in violation of subsection (a)(6), and count two charged a receipt of a firearm while under indictment for a crime punishable by imprisonment for a term exceeding one year, in violation of subsection (h)(1). Mr. Reese's Rule 29 motion was granted as to count one at the close of the evidence, and this petition thus deals only with 18 U.S.C. § 922(h)(1).

Both counts were based upon Reese's purchase of a shotgun for his girl friend at a sporting goods store in Los Angeles. The false statement count alleged that Reese made a false statement in connection with the completion of an Alcohol, Tobacco and Firearms form filled out at the time of the purchase. Based upon Reese's testimony, as well as that of others who had purchased firearms from the store in question, the district court doubted the government's testimony in support of that count and

acquitted Reese.

Prior to the instruction of the jury, defense counsel requested the district court to instruct the jury that Reese had to know that he was under indictment for a crime punishable by more than a year's imprisonment at the time he purchased the shotgun. That instruction was refused in spite of Reese's testimony that he did not know that he was under indictment at the time of the purchase.[1]

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Court Of Appeals Conflicts With The Decision Of The Sixth Circuit Court Of Appeals In The Case Of *United States v. Renner*, 496 F.2d 922 (6th Cir. 1974), And This Court Should Resolve That Conflict.

While the Congress may in certain circumstances enact criminal laws which do away with the requirement of intent, *United States v. Freed*, 401 U.S. 601 (1971); *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960), the general rule is that a showing of intent or *mens rea* is required as to the elements of a crime. The *mens rea* requirement . . .

> "is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will

[1] The evidence showed that Reese was in fact under indictment at the time of the purchase. That indictment charged a violation of the income tax code and resulted in an acquittal after Reese's trial in this case.

> and a consequent ability and duty of the normal individual to choose between good and evil."
>
> *Morrissette v. United States*, 342 U.S. 246 250 (1952).[2]

Here, as in *Morrissette*, the Court is faced with a statute which does not, on its face, require *mens rea*. As in *Morrissette*, though, intent should be read into the statute. Had the facts been as he thought them to be, petitioner would have committed no crime:

> "[I]f a person is ignorant of or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for the commission of the offense, he does not commit the offense even if his conduct would have constituted the offense had his information been correct."
>
> *Working Papers of the National Commission on Reform of the Federal Criminal Laws* 135 (1970); see Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 108 - 109.

There was nothing inherently criminal or evil about petitioner's purchase of a shotgun, and nothing to alert him to the possibility that his act might be a crime. *Compare United States v. Freed, supra*, and *United States v. Dotterweich*, 320 U.S. 277 (1943), *with Lambert v. California*, 355 U.S. 225 (1957), and *Morrissette v. United*

[2] See also Model Penal Code § 2.05 (Tent. Draft No. 4, 1955); G. WILLIAMS, CRIMINAL LAW §§ 70 - 76 (1953); Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 422 - 25 (1958); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933).

States, supra.[3]

Unlike the defendant in *United States v. Freed, supra,* petitioner was not involved with hand grenades or other unusual weapons. See *United States v. Freed, supra,* 401 U.S. at 616 (Brennan, J., concurring). Rather, he merely purchased a shotgun from a sales clerk in a sporting goods store.

It was not the nature of his *act* which was prohibited, it was the commission of that act by a person of Reese's *status.* The only question here is whether Reese was entitled to have the jury instructed that it was the government's burden to prove that he knew of his status when he obtained the shotgun.

Reese testified that he did not know that he was under indictment when he purchased the shotgun. In the Sixth Circuit that testimony would have entitled him to an instruction to the jury to the effect that a mistake of fact as to one's status as a person under indictment is a defense to a charge under 18 U.S.C. § 922(h)(1). *United States v. Renner,* 496 F.2d 922 (6th Cir. 1974). In the Ninth Circuit, on the other hand, such an instruction apparently need not be given. But see *United States v. Reese,* memorandum opinion at part (4) (Appendix p. 2).

The fact that Reese would require the government to prove in 922(h)(1) cases that the person receiving a firearm knows that he is under indictment is one like many others which must be proven in criminal cases. It is amenable to proof by circumstantial evidence and, unlike

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[3]Note that there *was* an attempt by the government to show the probability of knowledge of his indictment on the part of Mr. Reese. See *Lambert v. California,* 355 U.S. 225 (1957).

proof that a defendant knew that a certain firearm was or was not registered, the requirement of its proof would not undermine the government's ability to obtain convictions.

In fact, Reese was cross-examined on the issue of his knowledge that he was under indictment. The prosecutor elicited testimony from Reese that he had been indicted several times in order to show that Reese knew what an indictment was and that he therefore knew that he was under indictment when he purchased the shotgun. That line of questioning was proper only if, as the United States Attorney stated at the time, knowledge was a jury issue. Otherwise, such questions would be improper. Rules 608, 609, F.R.E. (1976).

Given Reese's acquittal on the false statement count, this case has assumed an interesting posture: Reese was convicted for violation of a federal statute on a strict liability theory. The jury was not even instructed that it had to find negligence on Reese's part; no mental state need have been shown. This Court's recent decision in *United States v. Park,* ..... U.S. ....., 95 S. Ct. 1903 (1975), seems to indicate that, *United States v. Dotterweich, supra,* notwithstanding, the Constitution requires that a defendant be at least negligent–that some *mens rea* be shown–in every case. *United States v. Park, supra,* 95 S. Ct. at 1912 ("highest standard of foresight and vigilance" is required by Act); Tushnet, *Constitutional Limitation of Substantive Criminal Law,* 55 B.U.L. REV. 775, 795 (1975).

In his noted article on *mens rea,* Professor Packer stated that, because of the stigma and possibility of loss

of liberty inherent in the criminal punishment process . . .

> "[n]o one should be sentenced to imprisonment or its equivalent without being afforded the opportunity to litigate the issue of *mens rea* . . . .
>
> Packer, *Mens Rea and the Supreme Court*, 1962 S. Ct. Rev. 107, 150.

It has been suggested that the Court's two recent decisions on the subject, in *Park* and in *Mullaney v. Wilbur*, ... U.S. ..... , 95 S. Ct. 1881 (1975), indicate that the Court has adopted Professor Packer's suggestion. Tushnet, *Constitutional Limitation of Substantive Criminal Law, supra*, 55 B.U.L. REV. at 800. Thus, where there is a possibility of imprisonment as punishment for a crime, the Due Process clause, or something, *Robinson v. California*, 370 U.S. 660 (1962), requires proof of *mens rea;* at the least it must be shown that the defendant acted negligently.[4]

Here, while there may or may not have been such a showing, it is clear that the jury was not properly instructed. The thesis set forth above not only explains the Court's decision in *Freed*, it distinguishes that case. In *Freed*, the Court, at least implicitly, applied a negligence standard to the defendant's conduct. Freed, said the Court, should have known better. The nature of the materials with which he dealt should have alerted him to the danger, the legal danger, inherent in his conduct.

Nothing about Reese's conduct should have warned him of the possible criminality of his act. He was entitled to rebut the government's charge against him, *Chambers v.*

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[4] And, of course, the jury must be instructed that it cannot convict absent such a showing. See *Mullaney v. Wilbur*, 95 S. Ct. 1881 (1975).

Mississippi, 410 U.S. 284, 294 (1973), but his attempted rebuttal was made meaningless by the court's refusal to instruct the jury that his mistake of fact was a defense.

2. Title 18 U.S.C. § 922(h)(1) Violates The Commerce Clause To The Extent That It Purports To Regulate The Acquisition Of Shotguns.

The commerce clause limits the regulatory power of Congress. Congress may regulate intrastate activities only when they substantially affect interstate commerce. *Perez v. United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In order to determine whether § 922 is a valid attempt by Congress to control the purchase of firearms, this Court must determine:

> "(1) Whether Congress had a rational basis for finding that receipt or possession of a firearm by [a person under indictment] affects commerce and (2) if it had such a basis, whether the means it selected to protect commerce are reasonable and appropriate."
>
> *United States v. Synnes*, 438 F.2d 764, 767 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

While the validity of § 922 has been upheld in the face of Commerce Clause attacks in the past, the cases have dealt with arms dealers who were not licensed or with the purchase of handguns. In those cases, the courts of appeal found a sufficient connection with interstate commerce because of the *dealers'* connection with inter-

state commerce or because of the grave threat that handguns pose to our society. See *United States v. Hornback,* 489 F.2d 1325 (7th Cir. 1973); and *Mandina v. United States,* 472 F.2d 1110 (8th Cir. 1973).

Here, the gun purchased was a shotgun. The Congressional Declaration of Purpose which relates to § 922 states:

> "The Congress hereby declares [that] it is not the purpose of this Title to place any undue or unnecessary federal restrictions or burdens on . . . the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activities . . . , § 101 of Pub. L. 90-618.
>
> '(2) that the ease with which any person can acquire firearms *other than a rifle or shotgun* . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States; * * * (5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding federal licenses . . . has tended to make ineffective the laws, regulations, and ordinances in the several states and local jurisdictions regarding such firearms; [and] (6) that there is a causal relationship between the easy availability of firearms *other than a rifle or shotgun* and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior."
>
> § 901 of Pub. L. 90-351.

Certainly the Commerce Clause does not prevent Congress from prohibiting the purchase of handguns by certain classes of persons. It is equally clear that the control of automatic weapons and explosives is permissible. However, the Congressional Declaration of Purpose in support of § 922 clearly indicates that there is no basis for the inclusion of shotguns within the ambit of the statutes.[5] That being the case, the provisions of § 922 which deal with the acquisition of shotguns exceed the power granted to Congress by the Commerce Clause.

CONCLUSION

For the reasons set forth above, it is submitted that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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[5] See 18 U.S.C. § 921(a)(4)(B), stating that a shotgun "is generally recognized as particularly suitable for sporting purposes."

APPENDIX

APPENDIX

MEMORANDUM OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. THOMAS REESE, Appellant.

No. 76-3100.

[FILED NOV 17 1977]

Appeal from the United States District Court for the Central District of California

Before: BARNES and GOODWIN, Circuit Judges and JAMESON*, District Judge.

The jury convicted Thomas Reese of violating 18 U.S.C. § 922(h)(1) (receiving firearm while under indictment). He appeals.

On October 11, 1972, Reese was indicted on four counts of willful evasion of income tax, and in due course pleaded not guilty and was released on bail pending trial.

On October 31, 1974, while still awaiting trial on the tax evasion indictment, Reese bought for his girl friend a Remington 12-gauge shotgun from a store on Western Avenue. At the time of the purchase he signed ATF Form 4473 which recited that he was not under indictment. He testified at the trial (1) that he did not know what an indictment was, and (2) that he did not read Form 4473 before he signed it.

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*The Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

The appellant's brief tenders a number of issues.

(1) The Constitutionality of The Statute

In material parts, § 922 is virtually identical to 18 U.S.C. App. § 1202, which has been held to be constitutional. *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976); *United States v. Thoresen*, 428 F.2d 654, 658-661 (9th Cir. 1970). We find no basis for a different rule for § 922.

(2) Sufficiency of The Evidence

The evidence presented a jury question.

(3) Motion to Suppress

The denial of motion to suppress certain evidence is not properly before us. The evidence was not used at the trial, and it was not shown to have led to the discovery of evidence that was used at the trial. The issue is, accordingly, moot.

(4) Failure to Instruct on Knowledge

Technically, no challenge to the instructions is properly before us because no transcript has been received showing either the instructions given or the requests refused. The transcript merely recites: "Whereupon, in open court, outside the presence of the jury, the jury instructions were discussed, reported, but not transcribed upon request." The transcript recites further that the jury instructions were read to the jury.

The designation of record asks for the "Court's Instructions", but counsel did not follow up the designation

to see that the instructions were transcribed. They have never reached this court. It is the duty of counsel to see that the record is complete.

On the merits, however, there is nothing to the appellant's point. We held in *United States v. Crow*, 439 F.2d 1193 (9th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972), that the government does not have to prove scienter. The point was reinforced in *United States v. Locke*, 542 F.2d 800 (9th Cir. 1976), and *United States v. Mathews*, 518 F.2d 1296 (9th Cir. 1975).

The elements of the crime are set out in the statute:

> "It shall be unlawful for any person–
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 922(h).

The defendant correctly cites *United States v. Renner*, 496 F.2d 922 (6th Cir. 1974), for the proposition that it is error in the Sixth Circuit to instruct the jury that "lack of knowledge that he was under indictment when he received the guns was no defense" to the count on receiving guns by an indicted person. In our case, however, the judge did not instruct that lack of knowledge was no defense; he did not instruct at all upon that issue.

Reese testified that he thought that as soon as he was arraigned and released on bail, which he had to admit had happened several times in more than one state, the indictment lapsed and became *functus officio*. The jury was free to believe this, if it wanted to, but it was not required to. On hearing such testimony, the trial judge should fashion a proper instruction, if one is requested, but on this record there is no proper request, and clearly no basis for a reversal.

On another point in the instructions, again there is nothing in the record to tell us what was requested or what was given. The court did take judicial notice that a violation of 26 U.S.C. § 7201 carries a penalty in excess of one year. It is not error to refuse to tell a jury that it can ignore a statute. It is especially not error when there was no request, of record, for such an instruction. *United States v. Houston,* 547 F.2d at 107-108. The court was not taking notice of a fact as a fact, but of a statute as law. This was not a hotly contested element of the crime; it appears in the appeal as an afterthought. There would have been no error even if the instruction had been requested and refused.

Affirmed.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on FEBRUARY 10th, 1978, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (REESE vs. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ASSISTANT UNITED STATES ATTORNEY
312 North Spring Street
Los Angeles, California 90012 (2 copies)

UNITED STATES DISTRICT COURT
312 North Spring Street
Los Angeles, California 90012
CASE NO. CR 76 579 RMT (1 copy)

UNITED STATES COURT OF APPEALS - NINTH CIRCUIT
U. S. Court of Appeals & Courthouse Bldg. - 7th & Mission Streets
San Francisco, California 94101 (1 copy)

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530 (3 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on FEBRUARY 10th, 1978, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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